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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~111.~~ 186

THE BROOKLYN LIFE INSURANCE COMPANY, PLAINTIFFS IN ERROR,

vs.

HELEN A. M. MILLER.—

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

FILED DECEMBER 30, 1869.

SUPREME COURT OF THE UNITED STATES.

No. 411.

THE BROOKLYN LIFE INSURANCE COMPANY, PLAINTIFFS IN ERROR,

vs.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE STATE OF MARYLAND.

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1 UNITED STATES OF AMERICA,
District of Maryland, to wit:

At a circuit court of the United States for the fourth circuit, in and for the Maryland district, begun and held at the city of Baltimore on the first Monday in November, (being the first day of the same month,) in the year of our Lord one thousand eight hundred and sixty-nine—present, the Honorable William F. Giles, judge of Maryland district; Archibald Stirling, esquire, attorney; Edward Y. Goldsborough, esquire, marshal; James W. Chew, clerk—among other were the following proceedings, to wit:

HELEN A. M. MILLER
vs.
THE BROOKLYN LIFE INSURANCE COMPANY.

Be it remembered that, on the third day of April, in the year of our Lord one thousand eight hundred and sixty-nine, William S. Bryan, esquire, attorney for the defendant, filed in the circuit court here the transcript of a record from the superior court of Baltimore City, in the words and of the tenor following, to wit:

Record.

STATE OF MARYLAND, *City of Baltimore, sct:*

2 At a session of the superior court of Baltimore City, in the eighth judicial circuit of the State of Maryland, begun and held at the court-house in the city of Baltimore, in and for the city aforesaid, on the second Monday of January, (being the eleventh day of the same month,) in the year of our Lord one thousand eight hundred and sixty-nine—present, the Honorable George W. Dobbin, associate judge of the supreme bench of Baltimore City, assigned to and presiding in the superior court of Baltimore City; John W. Davis, esq., sheriff; George Robinson, clerk—among other were the following proceedings, to wit:

HELEN A. M. MILLER
vs.
THE BROOKLYN LIFE INSURANCE COMPANY.

Be it remembered that, at the above term, to wit on the twenty-ninth day of January, in the year of our Lord eighteen hundred and sixty-nine, Helen A. M. Miller, by Hugh Lennox Bond and James R. Partridge, esquires, her attorneys, prosecuted and sued forth out of the superior court of Baltimore City here the writ of the State of Maryland of summons, in form following, to wit:

BALTIMORE CITY, *to wit:*

{ SEAL'S PLACE. } State of Maryland to the sheriff of Baltimore City, greeting:

3 You are hereby commanded to summon The Brooklyn Life Insurance Company to appear before the superior court of Baltimore City, to be held at the court-house in the same city on the second Monday of Feb'y, R. day next, to answer an action at the suit of Helen A. M. Miller, and have you then and there this writ.

Witness the Honorable T. Parkin Scott, chief judge of the supreme.

bench of Baltimore City, the 11th day of Jan'y, 1869. Issued 29th day of Jan'y, 1869.

GEO. ROBINSON, *Clerk.*

And the said Helen A. M. Miller, by her attorneys aforesaid, on the day of prosecuting and suing forth the foregoing writ, declared against The Brooklyn Life Insurance Company in the action aforesaid, with a notice to her declaration annexed, in form following, to wit:

BALTIMORE CITY, *to wit:*

Helen A. M. Miller, by James R. Partridge and Hugh Lennox Bond, her attorneys, sues The Brooklyn Life Insurance Company, for that whereas the said Helen A. M. Miller heretofore, to wit, on the 21 June, 1868, in the city of New York, to wit, at the city aforesaid, had caused to be made and issued by the said Brooklyn Life Insurance Company a certain writing of insurance, commonly called a policy of insurance, on the life of her late husband, Walter T. H. Miller, purporting thereby and containing therein that, in consideration of the sum of two hundred and fifty-four dollars and eighty-five cents ($254 85) to the said
4 company then paid, the receipt whereof it then acknowledged, and in consideration of the further payment of a like amount annually on or before the 21st day of June in each year thereafter, during the lifetime of her husband and continuance of said policy, the said Brooklyn Life Insurance Company did then and there assume, promise, and agree that it would well and truly pay, or cause to be paid, to the said Helen A. M. Miller, her heirs, executors, administrators, and assigns, within sixty days after due notice and proof of the death of her said husband, (the balance of the year's premium, if any, and all indebtedness due or to become due to the company to be first deducted therefrom,) the full sum of five thousand dollars on the following conditions, that is to say: In case the said Walter T. H. Miller should die or decease out of his natural life, except or unless any of the statements, declarations, or agreements made by or for the said assured to the said company, contained in the application for said policy, and dated 19 June, 1868, should be found untrue in any respect, or that the said Helen A. M. Miller should not pay, or cause to be paid, to the said company the amount of the premiums, or any note given for part thereof, whenever the same should become due, or that the said Walter T. H. Miller should, without the written consent of said company previously obtained, enter upon an aerial voyage, or should engage as
5 mariner, engineer, fireman, conductor, agent, messenger, laborer, or servant in any capacity in service on any sea, sound, inlet, river, lake, or railroad, or in the manufacture of gunpowder, fireworks or other explosive materials, or in submarine operations or mining, or should enter upon or engage in any military or naval service whatsoever, (the militia not in active service excepted,) or should die by his own hand, or by the hands of justice, or in consequence of a duel, or of the violation of any law of the United States, or of any State or county, at any time between the 21st day of June, 1868, and the 21st day of June, 1869, as by the said writing or policy of insurance, reference being had thereto, will fully appear; of which said writing the said defendant then and there had notice, to wit, on the day and year aforesaid, at the city aforesaid.

And thereupon afterwards, to wit, on the same day and year aforesaid, at the city aforesaid, in consideration that the said Helen A. M. Miller, at the special instance and request of the said defendant, had then and there paid

to [to] said defendant the sum of two hundred and fifty-four dollars and eighty-five cents as a premium for the insurance of the sum of five thousand dollars of and upon the premises mentioned in said policy, and had then and there undertaken and promised the said defendant to perform all things contained in the said writing of insurance on her part to be performed, it, the said Brooklyn Life Insurance Com-
6 pany, undertook and then and there faithfully promised the said Helen A. M. Miller, that it, the said defendant, would then and there become an assurer to the said Helen for the said sum of five thousand dollars of and upon the premises mentioned in the said writing of insurance, and that it would perform and fulfil all things contained in said writing to be performed on its part and behalf as such assurer for the said sum of five thousand dollars, and then and there by the hands of its president and secretary did subscribe to the said writing of insurance. And the plaintiff says that she paid, or caused to be paid, to the said defendant the said amount of premium for said insurance, and that all the statements, declarations, and agreements made by and for her, contained in the application for said policy, and dated 19 June, 1868, were true in every respect, and that the said Walter T. H. Miller, after the 21st day of June, 1868, and before the 21st day of June, 1869, and during the continuance of said policy, and before the day of suing out the original writ in this case, to wit, on the 10th day of October, 1868, and at the city aforesaid, did die and decease out of his natural life, to wit, by a natural death, and not by suicide, nor by the hands of justice, nor in consequence of any duel, nor of the violation of any law of any country, nor in any of the ways excepted in the said writing of insurance, and without the violation of any of the exceptions
7 mentioned; of all which the said defendant afterwards, to wit, on the day and year last aforesaid, at the city aforesaid, had notice. And the said plaintiff avers that she, on the 21st day of June, 1868, and ever since, and at the time of the payment of said premium to the defendant, was interested, and continued to be interested, in the life and event insured against in said policy to the whole amount thereby insured, to wit, the sum of five thousand dollars, to wit, at the city aforesaid; whereby and by reason of all which premises, and according to the tenor of its promise and undertaking aforesaid, it, the said defendant, then and there became liable to pay, and ought to have paid, to the said plaintiff the said sum of money so by it assured as aforesaid. Nevertheless, the said defendant, disregarding the said promise, &c., has refused, and now refuses, to pay the said sum to the plaintiff, or any part thereof, to her great damage, &c.

And the plaintiff sues also for money payable by this defendant to the plaintiff; and for goods bargained and sold by plaintiff to defendant; and for work done and materials provided by the plaintiff for defendant at its requests; and for money loaned by plaintiff to defendant; and for money paid by plaintiff for defendant at its request; and for money received by defendant for the use of the plaintiff; and for money found to be due from the defendant to the plaintiff on account stated between them.

8 And the plaintiff claims $10,000.

J. R. PARTRIDGE,
H. L. BOND,
For Pl'ff.

To the defendant, The Brooklyn Life Insurance Company:

Take notice that on the day of your appearance to this action in the

superior court of Baltimore City, a rule will be entered requiring you to plead to the said declaration within fifteen days thereafter.

H. L. BOND,
J. R. PARTRIDGE,
For Pl'ff.

A copy of which said declaration and notice was made out and sent with the writ to the sheriff of Baltimore City aforesaid thereon endorsed, "To be served on defendant."

At which said second Monday in February, being the day of the return of the foregoing writ, come into the superior court of Baltimore City here the said Helen A. M. Miller, by her attorneys aforesaid; and the sheriff of Baltimore City aforesaid, to wit, John W. Davis, gentleman, to whom the aforegoing writ was in form aforesaid directed, makes return thereof to the court here thus endorsed, to wit:

"Summoned by service on F. Medcalf, agent. Copy left.
"JOHN W. DAVIS, *Sheriff.*"

And The Brooklyn Life Insurance , being called, appears in court here, by William Shepard Bryan, esquire, its attorney.

And thereupon the said Helen A. M. Miller, by her said at-
9 torney, prays that The Brooklyn Life Insurance Company may answer to her declaration in the action aforesaid.

Whereupon it is ruled by the court here that The Brooklyn Life Insurance Company answer the declaration of the said Helen A. M. Miller in the action aforesaid, or judgment will be rendered against it.

And thereupon The Brooklyn Life Insurance Company, by its said attorney, filed in court here the following petition, to wit:

In the superior court of Baltimore City.

HELEN A. M. MILLER
vs.
THE BROOKLYN LIFE INSURANCE COMPANY.

The Brooklyn Life Insurance Company, a body corporate under the laws of New York, respectfully represents to the court that the plaintiff is a citizen of the State of Maryland, and that the defendant is a citizen of the State of New York, and that the matter in dispute amounts to five thousand dollars, exclusive of the costs. The said defendant thereupon prays that this cause may be removed for trial to the next circuit court of the United States to be held for the district of Maryland, and it offers to give such [such] good and sufficient security as the court may require for entering in said circuit court, on the first day of its next session, copies of the process herein against it, and of the proceedings herein of this court, and also its appearance in said circuit court.

10 W'M SHEPARD BRYAN,
Attorney for The Brooklyn Life Insurance Company.

Franklin Medcalf maketh oath in due form of law before me, a justice of the peace of the State of Maryland in and for the city of Baltimore, that he is the agent of The Brooklyn Life Insurance Company, the defendant within named, and that the facts stated in the foregoing petition are true to the best of his knowledge and belief.

GEO. A. HEMMICK, *J. P.*

And thereupon The Brooklyn Life Insurance Company aforesaid filed in court here the following writing obligatory, to wit:

Know all men by these presents that The Brooklyn Life Insurance Company, a body corporate under the laws of New York, by its agent, F. Medcalfe, and John T. King, as sureties, are held and firmly bound unto Helen A. M. Miller in the full and just sum of two thousand dollars, current money, to be paid to the said Helen A. M. Miller, her executors, administrators, or assigns; to which payment, well and truly to be made and done, we bind ourselves, our heirs, executors, and administrators, firmly by these presents, sealed with our seals, and dated this 12th day of March, 1869.

Whereas The Brooklyn Life Insurance Company has filed a peti-
11 tion to the superior court of Baltimore City for the removal of a certain cause in said court, now pending between the said Helen A. M. Miller, as plaintiff, and The Brooklyn Life Insurance Company, defendant, into the next circuit court of the United States for the fourth circuit, to be holden in the district of Maryland, for trial therein:

Now, the condition of this obligation is such, that if The Brooklyn Life Insurance Company shall, on the first day of the session of the said circuit court, file therein copies of all process and proceedings in the aforesaid cause, and appear in said circuit court to the said suit, then this obligation to be void; else to remain in full force and virtue in law.

F. MEDCALFE. [SEAL.]
JOHN T. KING. [SEAL.]

Test: E. SANDFORD.

F. Medcalfe, one of the above-named surities, maketh oath that he is individually worth more than the penalty of above-named bond.

Sworn to before me this ninth day of March, A. D. 1869.

W'M BAZZAND, *J. P.*

Which said bond is thus endorsed, to wit:

I believe the within bond sufficient.

GEO. ROBINSON, *Clk.*

Bond approved.

GEO. W. DOBBIN.

12 Whereupon the court passed and filed in said cause the following order, to wit:

In the superior court of Baltimore City, January term, 1869.

On consideration of the aforegoing petition, it is, this 12th day of March, 1869, ordered that the said cause be removed for trial into the next circuit court of the United States to be held for the fourth circuit and district of Maryland.

GEORGE W. DOBBIN.

Test: GEORGE ROBINSON, *Clerk.*

In testimony that the foregoing is a full and true transcript taken from the record and proceedings of the superior court of Baltimore City, in the therein-named cause, I hereunto set my hand and affix the seal of said court this nineteenth day of March, eighteen hundred and sixty-nine.

{ SEAL'S PLACE. }

GEORGE ROBINSON, *Clk.*

[5-c. rev. stamp cancelled.]

And now here at this day, to wit, on the fifth day of April, in the year of our Lord one thousand eight hundred and sixty nine, the said Helen A. M. Miller appears in the circuit court here by Archibald Stirling and George C. Maund, esquires, her attorneys, and the said The Brooklyn Life Insurance Company appears in court here by William S. Bryan, esquire, its attorney.

13 And thereupon the said plaintiff, by her attorneys, prays that the said defendant may answer to the declaration of her, the said plaintiff, in the plea aforesaid; whereupon it is ruled by the court here that the said defendant answer to the declaration of the said plaintiff in the plea aforesaid, or judgment will be rendered against it by default.

Whereupon the said The Brooklyn Life Insurance Company, by its attorney aforesaid, filed in court here the following plea, to wit:

Answer.

In the circuit court of United States for the district of Maryland.

HELEN A. M. MILLER
vs.
THE BROOKLYN LIFE INSURANCE COMPANY.

And the said defendant, by W'm Shephard Bryan, comes and says that it did not undertake, or promise in any manner or form, as the plaintiff hath above thereof complained against it; and of this it puts itself upon the country.

W. S. BRYAN,
Attorney for Defend't.

And the said plaintiff in like manner.

Thereupon further process of and upon the premises aforesaid, between the parties aforesaid, by consent of the said parties and their attorneys aforesaid, and by order of the court here thereon, is

14 continued until the first Monday in November next.

At which said first Monday in November, in the year of our Lord 1869, come again into the circuit court here the parties aforesaid, by their attorneys aforesaid.

And the parties aforesaid, by their attorneys aforesaid, filed in the circuit court here the following agreements, to wit:

Agreement.

In the circuit court of the United States for the district of Maryland.

HELEN A. M. MILLER
vs.
THE BROOKLYN LIFE INSURANCE COMPANY.

We agree in this case to waive a jury, and request the court to try and determine the issues of fact without the intervention of a jury.

Nov. 9th, '69.

GEO. C. MAUND,
Attorney for Plaintiff.
W'M SHEPARD BRYAN,
Attorney for Defend't.

Agreement.

In the circuit court of U. S. for district of Maryland.

MILLER
vs.
BROOKLYN LIFE INS. COMP'Y.

All errors in pleding are waived, & every defense admissible
15 under the general issue which would be admissible under any special plea.

W. S. BRYAN,
For Defendant.
GEO. C. MAUND,
For Pl'tff.

Whereupon all and singular the premises being seen, heard, and by the court here fully understood, for that it appears to the court here that the said plaintiff is entitled to recover in the plea aforesaid:

Therefore, it is considered by the court here that the said plaintiff recover against the said defendant as well the sum of five thousand and thirteen dollars and twenty-five cents, with interest from 24th day of November, 1869, as the sum of , adjudged by the court hereunto the said plaintiff on her assent for her costs and charges by her about her suit in this behalf expended, &c.

MEMORANDUM.—The said The Brooklyn Life Insurance Company, by its attorney aforesaid, before judgment was entered, tendered to the court here the following bill of exceptions, which was by the court here signed and sealed, and which is in form following, to wit:

Bill of exceptions.

In the circuit court of United States for the district of Maryland.

HELEN A. M. MILLER
vs.
THE BROOKLYN LIFE INSURANCE COMPANY.

16 At the trial of this action before the court, without the intervention of a jury, the plaintiff, to sustain the issues on her part, read in evidence the following agreement of counsel:

Agreement.

In the circuit court of the United States for the district of Maryland.

HELEN A. M. MILLER
vs.
THE BROOKLY LIFE INSURANCE COMPANY.

It is agreed in this case that the defendant is a body corporate, duly incorporated by the laws of the State of New York; that the signatures to the policy of insurance upon which this suit is brought, and which is offered by the plaintiff in evidence, are genuine, and that Walter T. H. Miller, the person named therein, died in Kent County, in the State of

Maryland, on the tenth day of October, in the year eighteen hundred and sixty-eight.

GEO. C. MAUND,
Att'y for Plaintiff.
W. S. BRYAN,
Attorney for Defend't.

And also offered in evidence the following policy of insurance:

Policy of insurance.

Life policy. No policy fee.

[50-c. int. rev. stamp, cancelled.]

THE BROOKLYN LIFE INSURANCE COMPANY,
17 *Montague st., Brooklyn; New York, 141 Broadway.*

No. 4447—amount, $5,000—premium, $254 85—age, 52.

By this policy of assurance, in consideration of the representations and agreements contained in the application therefor, and of the sum of two hundred and fifty-four dollars and eighty-five cents to them in hand paid by Helen A. M. Miller, wife of Walter T. H. Miller, and of the annual premium of two hundred and fifty-four dollars and eighty-five cents, to be paid on or before the twenty-first day of June in each and every year during the continuance of this policy, do assure the life of Walter T. H. Miller, of Reese's Corner, in the county of Kent, State of Maryland, in the amount of five thousand dollars for the term of his natural life, with participation in profits. And the said Brooklyn Life Insurance Company do hereby promise and agree to and with the said Helen A. M. Miller, well and truly to pay, or cause to be paid, the said sum assured to her, or, in case she shall die before the said Walter T. H. Miller, to pay the said sum assured to her heirs, executors, administrators, or assigns, within sixty days after due notice and proof of the death of the said person whose life is hereby insured; the balance of the year's premium, if any, and all indebtedness due or to become due to the company, to be first deducted therefrom: Provided, always, and it is hereby declared to be the true intent and meaning of this policy, and the
18 same is granted by this company, and accepted by the said Helen A. M. Miller, upon these express conditions, that if the statements, declaration, and agreement made by or for the said assured, contained in the application bearing date the nineteenth day of June, 1868, upon the faith of which this policy is made, or any part thereof, shall be found untrue in any respect; or in case the said Helen A. M. Miller shall not pay, or cause to be paid, the premium as aforesaid, on or before the day herein mentioned for the payment thereof, or any note or notes which may be given to and received by said company in part payment of any premium, on the day or days when the same shall become due; or in case the said person whose life is insured by this policy shall, without the written consent of this company previously obtained, enter upon an aerial voyage, or shall engage as mariner, engineer, fireman, conductor, agent, messenger, laborer, or servant, in any capacity, in service on any sea, sound, inlet, river, lake, or railroad, or in the manufacture of gunpowder, fire-works, or other explosive materials, or in submarine operations, or mining, or shall enter upon or engage in any military or naval services whatsoever, (the militia not in actual serv-

ice excepted;) or in case he shall die by his own hand, or by the hands of justice, or in consequence of a duel, or of the violation of any law of the United States, or of any State or country, then, and in every
19 such case, the company shall not be liable for the payment of the sum assured, or any part thereof, and this policy shall cease, and be null, void, and of no effect. And it is further understood and agreed by and between the parties hereto, that the dividend of profits which may become payable by virtue of this policy to the holder thereof, shall be applied toward the payment of the note taken for part premiums aforesaid, and that if this policy shall cease, or become null or void, the said Helen A. M. Miller, her heirs, executors, administrators, or assigns, shall be liable to pay to said company the amount of all notes taken for premium which shall remain unpaid, except the balance remaining unpaid on the note taken for part premiums and made payable at twelve months from date; and that the said last-mentioned note is to be canceled by the said company on the surrender and cancellation of the said policy; and, also, that this policy shall not be assigned without the consent of the said company in writing previously obtained. And it is also further understood and mutually agreed that in case the said person whose life is hereby insured shall be or shall become in any sense an inebriate, the company shall have the right to declare this policy canceled, and shall be absolved from all liability under it on paying to the holder thereof, or tendering in payment the amount of all unearned
20 premiums actually received thereon up to the time of such payment or tender of payment. On the surrender of this policy while in force, after the full amount of two (2) or more annual premiums have been paid in cash, including the payment of any note or notes given on account of premiums, the company will issue a paid-up policy for the amount of premiums paid, less any and all dividends paid on said policy.

In witness whereof The Brooklyn Life Insurance Company have, by their president and secretary, signed and delivered this contract at the city of New York, in the State of New York, this twenty-first day of June, one thousand eight hundred and sixty-eight.

C. W. BOUCK, *President.*

W. M. COLE, *Secretary.*

On the left-hand margin of which said policy of insurance are the following words, to wit:

Agents of this company are not authorized or permitted to waive, alter, or change any of the provisions of this policy.

And also offered in evidence the following letter to one of the counsel of the plaintiff, having proved that it was in the handwriting of C. W. Bouck, the president of the defendant:

Bouck's letter to Partridge.

BROOKLYN LIFE INS. CO.,
21 141 *Broadway, N. Y., and Montague st., Brooklyn.*

W'm M. Cole, Sec'y. C. W. Bouck, Pres't.

NEW YORK, *Jan'y* 19, '69.

JAMES R. PARTRIDGE, Esq., *Baltimore.*

D'R SIR: I have yours of 16th inst. stating that Walter T. H. Miller

was insured in this company for the benefit of his wife, and asking when she may have an adjustment of the same.

No policy of The Brooklyn Life Insurance Company of New York has ever been in force on the life of Walter T. H. Miller.

Very truly, yours,

C. W. BOUCK, *Pres't.*

And also proved that John W. Zimmerman, in behalf of the plaintiff, applied to F. Medcalfe, the general agent of the defendant in the city of Baltimore, (within a few days after the death of Walter T. H. Miller,) for the papers proper to use in furnishing proof of the death of the deceased, & was told by Medcalfe that he was instructed not to furnish them, for the reason that the defendant did not consider that the policy on Miller's life was ever in force.

And proved that the following letters were rec'd by said Medcalfe from the president of the company:

Bouck's letter (No. 1) to Medcalfe.

22 BROOKLYN LIFE INS. CO.,
141 *Broadway, N. Y., and Montague st., Brooklyn.*

W'm M. Cole, Sec'y. C. W. Bouck, Pres't.

NEW YORK, *Oct.* 27, 1868.

F. MEDCALFE, Esq.

D'R SIR: We have yours of 26th inst. This company issued a policy upon the life of Walter T. H. Miller on the 21st day of June, last, upon an application taken by our agents at St. Louis, but the premium on the same was not paid, consequently the policy has not been in force.

We have rec'd two communications within 3 or 4 days from a Mr. John W. Zimmerman, 4 South st., Baltimore, requesting us to forward to him a "blank proof of death." Will you please call upon him and state that the policy has at no time been in force.

Very truly, yours,

C. W. BOUCK, *Pres't.*

Bouck's letter (No. 2) to Medcalfe.

BROOKLYN LIFE INS. CO.,
141 *Broadway, N. Y., and Montague st., Brooklyn.*

W'm M. Cole, Sec'y. C. W. Bouck, Pres't.

NEW YORK, *Oct.* 29, '68.

F. MEDCALFE, Esq.

23 D'R SIR: We have yours of 28th. Policy No. 4,447, issued upon the life of Walter T. H. Miller, has at no time been in force, premium not having been paid. Here is another instance of the great impropriety of an agent delivering a policy upon a promise that the premium will be paid. Of course you will not furnish a blank proof of death.

Respectfully, yours,

C. W. BOUCK, *Pres't.*

The plaintiff also proved, by C. W. Bouck, the president of the company, that the company is a capital stock company, and that it keeps a register of all the policies issued by it, and that opposite each policy upon the register is entered the amount of premium to be paid upon it; that the policy issued to Miller is entered upon the register in the same manner as the other policies issued by the company; that the policy of Miller was reported not paid by its agents, Messrs. Dutcher & Fassett, and is so entered upon the books of the company, and that the cash premium never was paid to the company; that the application for insurance filed with the return to the commission to take testimony was received by the company, and thereupon the policy sued on was sent by mail to Dutcher & Fassett, the defendant's agents in St. Louis. The agents of the defendant, Dutcher & Fassett, reported the policy as not paid; this was done in their August report; their reports were
24 made on the first of each month, & the policy was never considered by the company in force.

The plaintiff further proved by her own testimony that she was the widow of the deceased, and that her husband handed her the policy, & said, "Helen, here is a present for you;" that she never had paid anything for it to the company, and had never given any notes to the defendant, and that she had no knowledge that the premium was unpaid.

The plaintiff offered in evidence the defendant's charter of incorporation, which contains the following material passages:

Passages from defendant's charter.

Page 10: "The capital stock of the company shall be one hundred and twenty-five thousand dollars, which shall be divided into shares of one hundred dollars each. The stock shall be transferable only on the books of the company in the manner which the board shall prescribe."

Page 11: "The holders of the capital stock shall be entitled to receive a semi-annual dividend, not exceeding three and a half per cent., which dividend may be made payable at such time and in such manner as the board of directors shall prescribe. They shall also be entitled to receive a sum not to exceed twenty per cent. of the net profits of the company, subject to the modification provided for in Sec. 1, Article 7."

25 Page 21: "The board of directors shall cause a statement of the affairs of the company to be made annually, which shall exhibit the amount of the surplus or net profits of the company as near as the same can be ascertained, after deducting interest, losses, and expenses, and a sufficient sum to reinsure all the outstanding policies of the company, and to cover all the other obligations of the company. The surplus or net profits so ascertained shall be apportioned as follows: The holders of the capital stock shall be entitled to receive a semi-annual dividend, not exceeding three and a half per cent., payable at such time and in such manner as the board of directors shall prescribe. They shall also be entitled to receive a sum, not exceeding twenty per cent. of the net profits of the company; the remainder to the holders of policies who may be entitled to participate in the profits."

Page 22: "The board of directors shall have power, in case of the nonpayment of the premiums when due, or of any other violation of the condition of the policy of insurance, or of any other policy issued by the company, to declare such policy forfeited, and to cancel the same, in which case said policy and all payments made thereon shall be forfeited to the company, and all its obligations, under or by virtue of such forfeited policy whatsoever, shall thereupon cease and become null and void."

The defendant, to sustain the issues on its part, read in evidence the following agreement of counsel:

26 *Agreement.*

In the circuit court of the U. States for Maryland district.

MILLER
vs.
THE BROOKLYN LIFE INSURANCE COMPANY.

It is agreed that the testimony taken under the commission shall be admissible in evidence to the same extent and in the same manner as if the commission had been regularly executed by a U. S. commissioner duly authorized, subject to all objections as to competency. And the letter-press copies of letters filed with the commission shall be admissible to the same extent that originals would have been.

W. S. BRYAN,
Att'y for Def't.
GEO. C. MAUND,
Att'y for Pl'ff.

And also read in evidence the testimony taken under a commission to St. Louis, which is as follows, omitting the commission & the formal return of the commissioner.

Evidence under the commission.

Depositions of witness produced, sworn, and examined by me on the 15th day of October, A. D. 1869, at the hour of nine o'clock a. m.,
27 in the city of and county of St. Louis, State of Missouri, by virtue of a commission issuing from the United States circuit court of the district of Maryland, to me directed, for the examination of witnesses in a certain cause now depending in said court, wherein Helen A. M. Miller is plaintiff and The Brooklyn Life Insurance Company is defendant.

SOLOMON SCOTT, jr., of lawful age, being produced, sworn, and examined on the part of the defendants, deposeth as follows:

My name is Solomon Scott, jr.; I reside in St. Louis; am 47 years old on 20th of March next. I am acquainted with Walter T. H. Miller; have known him from infancy, our first cousins were in business together for nearly 12 years. I have seen Walter T. H. Miller write very often—every day for years. I know his signature.

(Witness is here shown a paper marked Exhibit "A," and after examing the signature to it, says:)

It is the signature of Walter T. H. Miller on the first and second page, and mine on the third page.

(Witness is here shown a letter dated July 10, 1868, hereto annexed, and marked Exhibit "B," and upon examing it, says:)

That the whole letter is in the handwriting of Walter T. H. Miller.

(Witness is then shown two other letters, dated Aug. 3rd & Aug. 18th, 1868, hereto annexed and marked Exhibits "C" & "D," and upon examing them, says:)

They are in the handwriting of Walter T. H. Miller. Mr. Dutcher,

some time in July, 1868, called on me for the amount of the cash
28 premium on a policy in The Brooklyn Life Insurance Company.
I declined paying it. I made a promise to Mr. Miller before we separated as partners to pay this cash premium. It was about the time the application was made. I made no promise to Mr. Dutcher, nor to any ag't of the company, to pay this cash premium. I have always understood that Mr. Dutcher was acting in the capacity of ag't of the defendant. Mr. Dutcher is now dead.

Cross-examination:

I don't recollect in whose presence I signed Exhibit "A." I don't know whether Mr. Dutcher was present or not. When I made the promise to Mr. Miller to pay the premium, Mr. Dutcher was not present, nor was any one else. I think this promise was made on the same day of the signing of the application. It was about two or three weeks after the promise was made that Mr. Dutcher called on me for the payment of the cash premium, and I declined to pay it. Had Mr. Dutcher called on me any time prior to the 19th day of June, 1868, I would have paid it. Mr. Miller left the night of the 19th of June. At the time Mr. Dutcher called, he came in and asked me for the premium, and I refused to pay it. We had some words, I don't recollect what they were. He told me he had charged himself with the money with the expectation of getting it from me, as I had promised him. I denied that I had ever promised him,
(Dutcher.) Whether he said he had reported the money to
29 the company as paid, I don't recollect, but I don't think he did; it is my impression that he said nothing to me on that point. He stated to me that he had given Mr. Miller time in which to pay the cash premium.

(Defendant's counsel object to so much of the above cross-examination as details the conversation between Mr. Dutcher and the witness as incompetent and irrelevant.)

Re-examination:

The application was signed by me between seven and eight o'clock in the morning. I don't recollect the exact date. I see it is dated the 19th of June, 1868. I don't recollect that it was signed on the 19th June. Upon reflection, I recollect that Mr. Dutcher brought Exhibit "A" bet. seven and eight of a morning, as he was going to his office, and I then filled up and signed my part of it, and he took it with him.

Quest. At the time you made the promise to pay the cash premium to Mr. Miller, had you any intention of buying him out?

(Objected to by pl't'ff's att'y.)

I had not.

Re-cross-ex.

Did Mr. Dutcher, at the time you say the application was signed, make any demand for the cash premium of Mr. Miller, or say anything about when it was to be paid?

(Objected to by def't's counsel.)

No, sir; he made no remarks about the money. I filled it up and signed it.

30 SOL. SCOTT, JR.

Sworn and subscribed to before me this 15th day of October, A. D. 1869.

GEORGE W. GRIFFIN, *Commissioner.*

ALFRED K. FASSETT, being produced, sworn, and examined on the part of the defendant, deposeth and saith as follows:

My name is Alfred K. Fassett; reside in St. Louis; am the agent of The Brooklyn Life Insurance Company; have been ag't since Jan., 1868, and was acting with T. B. Dutcher. I knew slightly Walter T. H. Miller. I was present when the application for the life policy in question was made.

Quest. State what occured at the time that application was made, what the premium was to be, and what amount was to be cash, and what amount was by note.

Mr. Miller came in, having had previous conversation with Mr. Dutcher, and asked to know what the cash premium would be, and what the note would be for a policy of $5,000. Mr. Dutcher figured up the amount of the premium, the cash part amounted to $86 26; this cash included the interest upon the note, the whole premium amount to $254 85; the bal. was made up in two notes, one at six months and one at twelve. Mr. Miller told Mr. Dutcher to call on Mr. Sol. Scott for the cash part of the premium; he said Mr. Scott had promised to pay it.

31 The application was written out and signed by Mr. Walter T. H. Miller; this was all that was done then at that time. The application was not signed at that time by Mr. Scott; he was not at the office. The application, after being completed, was sent, I think, the next day, to New York to the home office for a policy. We have to send all applications to the home office for policies. We are not allowed to issue policies. In the course of a week or ten days the policy came. The policy with the notes to be signed were sent to Miller by mail. The notes were received in due course by mail from Miller, signed by him. I cannot swear to the handwriting of Walter T. H. Miller. The letters mentioned in the deposition of Mr. Scott, and marked "B," "C," & "D," were received from Mr. Miller by Dutcher & Fassett. Mr. Dutcher is dead. I have seen him write often. I can swear to his handwriting and signature. Mr. Dutcher wrote the letter inclosing the policy to Mr. Miller.

(Witness is here shown a letter-press copy of a letter dated July 2nd, 1868, marked Exhibit "E," also letter-press copies of three other letters, dated July 23, 1868, marked "F;" Sept. 10, 1868, marked "G;" and Oct. 14, 1868, marked "H," and, upon examining them, says:)

That they are all letter-press copies of letters in the handwriting of Mr. Dutcher, his deceased partner. These letters were sent from our office at the dates of each of them respectively by mail to Mr. Miller, in Maryland. The words of Mr. Miller, when he directed Mr.

32 Dutcher to call on Mr. Scott for the cash part of the premium, were these: "Send the policy to me, with the notes, and call on Sol. Scott for the cash part, as he has just promised me that he will pay it." This cash premium was never paid, to my knowledge, and I should be certain to know it if it was paid. At the time the letter dated Oct. 14th, 1868, was written, I heard from Mr. Hart, I think, that Mr. Miller was sick. On the strength of that we wrote this letter. I did not know at the time this letter was written that Mr. Miller was dead, nor was it known at the office.

Quest. Do you know that Mr. Dutcher called on Mr. Scott for the cash premium; and, if so, at about what time?

Mr. Dutcher and I went to Scott's store, but I did not go in; we both went for the purpose of demanding the money. I left Mr. Dutcher there, and did not see him again that evening. This was between the 20th and 25th of July, 1868. (The above testimony objected to as incompetent.) Mr. Dutcher, the next day, wrote the letter, dated July

23rd, marked "F," to Mr. Miller. The letter of Mr. Miller, dated Aug. 3rd, 1868, is the reply to that letter. The last letter we received from Mr. Miller is dated Aug. 18th, 1868. The three letters, dated July 10th, Aug. 3rd, & Aug. 18th, 1868, are all the letters we ever received of Mr. Miller.

Cross-examination:

Dutcher & Fassett were the gen'l agents of The Brooklyn Life
33 Insurance Company from Jan., 1868, up to the time of Mr. Dutcher's death, May, 1869, for the purpose of transacting all the business of the company in this State. At the time the application was signed, Mr. Miller was told that the cash premium would have to be paid when the policy came. I am positive of this fact.

Quest. Then what do you mean in your letter of July 2nd by saying "The cash payment we will get of Scott when the proper time arrives?"

We meant this: It was the custom with us, with parties that we are well acquainted with, and knew them to be good, to call for the money at any time previous to the report day. The report day for this amount was Aug. 1st. We did not report this amount to the company. We never gave any receipt for the cash premium. With each policy goes a little statement which the agents are required to sign. This goes to the policy-holder with the policy. It is a general receipt, signed by the agents. In this case such a receipt was for $254 85. Was signed by the agents, and went to Mr. Miller with the policy. We are not in the habit of giving this receipt unless we receive the money and the notes, but occasionally do so with parties that we are well acquainted with, and have confidence that we can get the money on call. Such a receipt was given in this case. Mr. Miller was [was] not informed when the application was made that the cash premium would not be required until the latter part of July.

34 Quest. At the time the application was made, or at the time the policy was received or sent, or afterwards, was there any charge made on the books of Dutcher & Fassett to any one for the cash premium; and, if so, to whom?

No; there was no such charge to anybody, never. The receipt sent to Mr. Miller with the policy must have been dated about the first of July, 1868. I can't tell the exact date.

(Witness is here shown a letter, marked Exhibit "O," and states:)

That it is in the handwriting of Mr. Dutcher. I am still the agent of The Brooklyn Life Insurance Company in this city. In making our report to the home office the first of Aug. we made no mention of this policy, nor in any other report. The receipt mentioned by me names the amount of cash, int., and notes, and is for the full amount of the premium, $254 85, and is signed, Rec'd pay't by Dutcher & Fassett, ag'ts.

Re-examination:

Quest. Why did you send that receipt to Mr. Miller without receiving the cash premium?

Because, from what Mr. Miller said, we had confidence that we could get the money from Mr. Scott at any time we would call for it.

Re-cross examination:

The policy was made payable to Mrs. Miller.

(Objected to as incompetent.)

35 Quest. Was the premium ever demanded of her?

(Objected to by def't's att'y.)

No.

ALFRED K. FASSETT.

Sworn & subscribed to before me this 15th day of October, A. D. 1869.
GEORGE W. GRIFFIN, *Commissioner.*

The exhibits referred to in the aforegoing commission, and thereto annexed, are as follows, to wit:

Exhibit A.

4447. BROOKLYN LIFE INSURANCE COMPANY.

Statement required from persons proposing to effect assurance in this company, and which forms the basis of the contract.

1. Party whose life is to be insured, name at full length: Walter T. H. Miller; residence, Kent Co., Maryland; occupation, farmer & merchant; P. O. address, Reese's Corner, Kent County, Maryland.

2. For whose benefit is the assurance to be effected?—Name at full length: Helen A. M. Miller; residence, ; occupation, . Relationship to life to be assured: wife.

3. Amount of assurance: $5,000. Kind of policy: life.

4. How do you wish to pay the premium?—Annually. If all cash, state if annually, semi-annually, or quarterly. If one-third note and two-thirds cash, state it so—40 per ce't note.

36 5. Where and when was the party born?—At Maryland; year, 1815; month, Dec.; day, 25; age at nearest birthday, 52.

6. Is the party in good health, and (as far as he knows) free from any symptoms of disease?—Yes.

7. Is the party married?—Yes.

8. Are the habits of the party at present, and have they always been, sober and temperate?—Yes.

9. Has the party been vaccinated, and had small-pox or varioloid?—Yes, to first.

10. A. Has the party been acclimated to a southerly climate?—B. If so, when and how?—C. Has the party had the yellow fever?—A, B, C.

11. Has the party ever had any of the following diseases, or (as far as he knows) any symptom thereof?—Aneurism, apoplexy, asthma, bronchitis, cancer, consumption, disease of the heart, dropsy, epilepsy, fits, (of any kind,) fistula, gout, insanity, disease of the liver, neuralgia, paralysis, palpitation, rheumatism, rupture, scrofula, spinal disease, spitting blood, disease of the urinary organs. If the party has had one or more of these diseases, please state particularly which, when, how severe, and whether fully recovered; and answer "No" as to all the rest.—No.

12. Is the party subject to dyspepsia, dysentery, or diarrhœa?—No.

13. Has the party ever had an habitual cough?—No.

37 14. Has the party ever met with any severe personal injury? If so, what?—No.

15. Has the party had, during the past ten years, any sickness or disease? If so, state the particulars.—No.

16. Name and residence of the physician who prescribed and attended the party.

17. Have the ancestors of the party generally reached old age?—Yes.

18. Have the parents, uncles, aunts, brothers, or sisters of the party been afflicted with insanity, consumption, or with any pulmonary, scrofulous, or other constitutional disease hereditary in its character?—No.

19. Are the parents of the party living?—Father, age ; state of his health . Mother, age ; state of her health .

20. Are the parents of the party dead?—Father, yes; age at death, 74; cause of death, old age. Mother, yes; age at death, 44; cause of death, child-birth.

21. How many brothers has the party had?—2. How many are living?—At what ages?—What is the state of their health respectively?—How many have died?—2. At what ages?—21, 25. Of what disease did they die?—Typhoid pneumonia. How many sisters?—5. How many are living?—4. At what ages?—50, 48, 46, 34. What is the state of their health respectively?—Good. How many have died?—1. At what age?—18. Of what disease did they die?—Typhoid pneumonia.

38 22. Name and residence of an intimate friend not interested in the proposed assurance.—Sol. Scott, St. Louis.

23. What amount is now assured on the life of the party, and in what company or companies?—5,000, Manhattan Life, N. York.

24. Has any proposal to insure the party ever been declined by any company, or has he ever applied for, been examined, or partially examined with reference to life insurance, and been declined?—No.

It is hereby declared that the above are fair and true answers to the foregoing questions, and it is agreed by the undersigned that the above statements shall form the basis of the contract for assurance, and also that any untrue or fraudulent answers, or any suppression of facts in regard to the party's health, will render the policy null and void, and forfeit all payments made thereon; also that the policy of assurance hereby applied for shall not be binding upon this company until the amount of premium as stated therein shall have been received by said company, or some authorized agent thereof, during the lifetime of the party therein assured.

Dated at Saint Louis this 19th day of June, 1868.

(Signed) { HELEN A. M. MILLER, } *Party benefited by the*
Per WALTER T. H. MILLER. } *Assurance.*
WALTER T. H. MILLER,
Party proposed for Assurance.

Witness—T. B. DUTCHER.

39 Applicants must read over their answers before signing their names.

N. B.—The husband can sign for his wife, thus:

SARAH SMITH, } *Party benefited by the*
By JOHN SMITH. } *Assurance.*
JOHN SMITH,
Party proposed for the Assuranc.

On the left-hand border of the first page of which said Exhibit "A" are the following words, to wit:

I hereby certify that I am acquainted with the party whose life is proposed for assurance by this application, and is the same who has been examined by the medical examiner.

DUTCHER & FASSETT,
Agent at St. Louis, Mo.

And on the right-hand border of the first page of which said Exhibit "A" are the following words, to wit:

☞ Agents are particularly requested to see that names are plainly

written and correctly spelled. Let no endorsement be made on the application.

N. B.—Persons proposing an assurance are required to answer all the questions definitely and fully, and to affix their signatures in the presence of a witness.

2nd page.

No. BROOKLYN LIFE INSURANCE COMPANY.

40 Questions to be answered by the medical examiner:

1. Name and residence of the person examined.—Walter T. H. Miller.

2. Please state each of the following particulars as fully and exactly as possible: Weight.—154. Height.—5 feet $8\frac{3}{4}$ inches. Circumference of the chest: Under forced expiration.—$30\frac{1}{2}$. Under forced inspiration.—$34\frac{1}{2}$. Is the general appearance that of health and vigor?—Yes. Is the complexion clear and healthy?—Yes. Is the gait firm and elastic?—Yes. Are the flesh and muscles hard?—Yes. Figure?—Good.

3. Are the functions of the brain, the muscular and nervous systems in a healthy state?—Yes.

4 A. Is the respiratory murmer clear and distinct over both lungs?—A. Yes. B. Is the character of the respiration full, easy, and regular?—B. Yes. C. Are the organs of respiration free from any signs or symptoms of disease?—C. Yes.

5 A. Is the character of the heart's action uniform, free, and steady?—A. Yes. B. Is the rythm regular and normal?—B. Yes. C. Are the heart and blood-vessels free from disease?—C. Yes.

6 A. State the rate of the party's pulse.—A. In a sitting posture, 76; in a standing posture, 80. B. Is it uniform, regular, and steady?—B. Yes.

7. Is the party habitually free from any tendency to cough, ex-
41 pectoration, difficulty of breathing, or palpitation?—Yes.

8 A. Are the abdominal organs in a healthy state and free from any tendency to disease?—A. Yes. B. Are the functions of the kidneys, bladder, and other urinary organs in a healthy state and free from any tendency to disease?—B. Yes. (Please apply the tests if there is any reason to suspect disease of the kidneys.)

9. Is the party exempt from any predisposition, either hereditary or acquired, to any local or constitutional disease?—Yes.

10. Have the party's parents, brothers, or sisters been exempt from pulmonary or other disease hereditary in their nature?—Yes.

11 A. Has the party ever had severe injury or illness?—A. No. B. If so, has it had any effect upon the constitution?—B.

12. Has vaccination been so recent and effectual as to be a protection?—Yes.

13. Do you believe the party to be uniformly and strictly sober and temperate in all the habits of life?—Yes.

14 A. Do you consider the applicant's life safely assurable?—A. Yes. B. Do you recommend that a policy be granted?—B. Yes.

15. If the party is a female, please ascertain and state whether she has had children. (A.) How many? (B.) When last pregnant?
42 (C.) Whether any miscarriages? (D.) Are her menses now regular?—A. B. C. D.

I hereby certify that I have given true answers to all the questions put to me by the medical examiner, and that I am the same person described in the foregoing application.

(Signed) WALTER T. H. MILLER,
Person Examined.

This is to certify that I have carefully examined the person above named, and witnessed the same party's signature to this certificate.

Dated at St. Louis, this 19th day of June, 1868.

(Signed) S. B. HOUTS,
Medical Examiner.

3rd page.

No. BROOKLYN LIFE INSURANCE COMPANY.

Questions to be answered by the physician of the party applying for insurance:

1. Name and residence of the party whose life is to be insured.

2—A. How long have you known the party whose life is herein proposed for insurance, and who, in the foregoing application, refers this company to you as his medical attendant?—A. B. Have you attended the party professionally, and for what diseases?—B. C. How recently have you done so, and for what disease?—C.

43 3. A. Has the party, or the parents, aunts, uncles, brothers, or sisters been afflicted with pulmonary complaints, scrofula, insanity, or any constitutional or hereditary disease?—A. B. Is there such a personal or family predisposition?—B. C. Has the husband or wife of the party been afflicted with either of the above diseases; if so, which, and how severely?—C.

4. Has the party ever had any of the following diseases, or (as far as he knows) any symptoms thereof: Aneurism, apoplexy, asthma, bronchitis, cancer, consumption, spinal disease, disease of the heart, dropsy, epilepsy, fits, (of any kind,) fistula, gout, insanity, disease of the liver, neuralgia, paralysis, palpitation, quinsy, rheumatism, rupture, scrofula, spitting of blood, disease of the urinary organs. If the party has had one or more of these diseases, please state particularly which, when, how severe, and whether fully recovered, and answer "No" as to all the rest.

5. A. Are the functions of the brain, nervous and muscular system, the lungs, heart, the abdominal and urinary organs in a healthy condition?—A. B. Has the party, to your knowledge or belief, been afflicted with diseases of either of these organs, or with any illness of such a nature as to impair or threaten the general health?—B. C. Has

44 the party had any serious wound, hurt, or other accident or injury? If so, what effect has it had on the constitution?—C.

6. A. Is the party uniformly and strictly sober and temperate?—A. B. Has it always been so?—B.

7. Is the party now in good health, and free from any symptoms of disease, so far as you know or believe?

8. Do you believe that the constitution, health, habits, and circumstances of the party are, and have been, such as to render the life safely assurable?

The physician is requested to give any additional information which he may possess.

(Signed) ——— ———

Dated , 186 : Residence, ——— ———

Questions to be answered by the friend of the party to be assured:

1. How long have you known the party whose life is herein proposed for assurance?—Forty-five years.

2. Do you know or believe that the habits of life of the party are at present, and have they always been, sober and temperate?—Yes.

3. Is the party's mode of life active or sedentary?—Very active.

4. Have the party's parents, uncles, aunts, brothers, or sisters, to your knowledge, been afflicted with mental derangement, pulmonary complaints, or any constitutional or hereditary predisposition to disease that tends to shorten life?—No.

5. Do you know or believe that the party has been afflicted with any serious disease?—Never to my knowledge.

6. Do you know or believe that the party has been afflicted with any mental derangement?—No.

7. Do you believe that the constitution, and the habits and circumstances of the party are such as to render the life safely assurable?—I do.

(Signed) SOL. SCOTT, JR.

Dated June 19th, 1868.

Exhibit B.

REESE'S CORNER, M'D, *July* 10, '68.

Mess. DUTCHER & FASSETT, *St. Louis, Mo.*

GENTS: I herewith enclose my two notes as directed, which I hope will be rec'd, and that I may live to give and pay at least twenty.

With kind regards to Mr. & Mrs. Quinby, Mr. Dutcher, & Langlay, and all friends, yours, truly,

WALTER T. H. MILLER.

Exhibit C.

REESE'S CORNER, M'D, *Aug't 3d*, 1868.

Mess. DUTCHER & FASSETT, *St. Louis, Mo.*

GENTS: Yours of the 23rd last month did not come to hand until yesterday. In reply I reget that Mr. Scott did not do as he promised you. I did not solicit or ask him to pay the note. He told you that he would pay you the note. Had he not told you I should have provided for the amount long since. I rec'd a letter from Sol. a few days since, stating that he had drawn on me, in favor of his sister, for fifty dollars, which I intended to have paid to-day, supposing that it was part of the am't he had paid to you. I have about sixty dollars on hand. Will get the $86 26 and send to Baltimore and perchase a draft on New York, and have it sent in a day or two. My opinion of Mr. Scott is that he is a jack ass. He is not to blame for being one, for he was unfortunately constituted without brains.

Hoping that all things will be all right in a few days, I am, yours truly,

W. T. H. MILLER.

Exhibit D.

REESE'S CORNER, *Aug't* 18, '68.

Mess. DUTCHER & FASSETT, *St. Louis.*

D'R GENTS: I shall ship some wheat to-morrow to Mess. Cox &

Brown, Balto. Will direct them to send you a draft on New York for $86 26. I reget the delay and hope it may never occur again. Shall be in St. Louis this fall. Will make arangements to have all my notes paid at maturity.

47 Yours, truly,

W. T. H. MILLER.

Exhibit "E."

JULY 2D, 8.

WALTER T. H. MILLER, Esq.,
Reese's Corner, Kent County, Maryland.

DEAR SIR: Enclosed we give you your policy, No. 4,447, for $5,000 doll's, and hope that you may live to pay twenty premiums yet.

You will find enclosed the yearly note, and the 6 months' note, both of which you will please sign and return to us by mail. The cash payments we will get of Scott when the proper time arrives.

We see the old firm is changed. May good luck and prosperity attend them.

Truly, yours,

DUTCHER & FASSETT.

Exhibit "F."

JULY 23D, 8.

WALTER T. H. MILLER, Esq.,
Rees Corner, Kent Co., M'd.

DEAR SIR: The last of the month we make our report according to custom, and last evening, going home, I (the writer) called in the

48 old store and found our friend Scott intending to start east on Monday. I suggested to him that he should pay your cash part of premium as you suggested to me, but he would not listen to it at all, so we depend on you for it, the am't being $86 26, made up as follows:

One-half of cash premium	76 46
Interest on annual note	7 13
" " 6 months' "	2 67
	$86 26

For which amount please send me check on New York.

We have had wonderful hot weather here for this whole month; many have died from the effects of the heat; to-day we have had a refreshing shower, and is more pleasant.

Truly, yours,

DUTCHER & FASSETT.

Exhibit "G."

SEPT. 10TH, 8.

W. T. H. MILLER, Esq.,
Reese's Corner, Kent Co., M'd.

DEAR SIR: Your several letters have been rec'd; the last, under date of Aug't 18th, in which you remark, "I shall ship wheat to-morrow to Mess. Cox & Brown, Balt., and will instruct them to send you a draft on N. York for $86 26."

The draft has never been sent, or it has never come to hand. Now, sir, we are fearfull you will lose your policy if payment is not
49 made soon; give it your attention at once if you please; and as it has been running so long, you will have to add the interest, which will be $1 34, making the am't to be remitted $87 60 doll's.

Truly, yours,

DUTCHER & FASSETT, *Ag'ts.*

Exhibit "H."

OCT. 14TH, 8.

WALTER T. H. MILLER,
Reese's Corner, Kent Co. M'd.

DEAR SIR: We learn from Mr. Scott that you are quite sick. As you have not paid your cash payment on your life policy in the Brooklyn, you must be aware that the policy is forfeited, and we now enclose you two notes for part payment of the premium. It has now been standing for four months beyond the time of payment.

You will please return the policy to us. The writer regrets very much to hear of your illness, and hope you may speedily recover.

Truly, yours,

DUTCHER & FASSETT,
Gen'l Ag'ts.

Exhibit "O."

BROOKLYN LIFE INS. CO.,
141 *Broadway, N. Y., and Montague st., Brooklyn.*

W'm M. Cole, Sec'y. C. W. Bouck, Pres't.

50 Dutcher & Bassett, gen'l agents for Missouri. Principal office, St. Louis.

ST. LOUIS, *Octo. 26th*, 1868.

JOHN W. ZIMMERMAN, Esq., *Baltimore, M'd.*

D'R SIR: Your favor of the 19th, making enquiries of life and insurance policies of W. T. H. Miller, is rec'd. In regard to the policy of the Brooklyn Life, it has been forfeited long since for non-payment of premium.

No consideration whatever has ever been received, not a dollar has ever been paid on it, consequently it is worthless.

The other policy you refer to as being in possession of Mess. Scott & Hart, was issued by the Manhattan Life Ins. Co. of New York. Mess. W'm Nisbet & Co., ag'ts here.

Truly, yours.

DUTCHER & FASSETT, *Ag'ts.*

The originals of the letter-press copies of letters were produced & proved to have been received by Miller in his lifetime, with the exception of the last, which reached his home after his death.

The following is the receipt which was sent to Miller by Dutcher & Fassett in their letter enclosing the policy.

Receipt.

BROOKLYN LIFE INSURANCE COMPANY,
141 *Broadway, New York.*

[2-c. rev. stamp uncancelled.]

51 Walter T. H. Miller—June 21, '68—policy No. 4447—life—amount of $5,000—amount of premium, $254 85.

NOTE.		CASH.	
One-third loan note	$101 94	Two-thirds cash.....	$76 46
Cash note	76 45	Interest on loan note	7 13
		" cash note....	2 67
	178 39		
		Total cash.....	$86 26

Received payment.

DUTCHER & FASSETT, *Agents.*

July 1st, 1868.

N. B.—Agents must not deliver policies until premium is received, as no policy is in force until paid for.

The words "must not deliver" and the words "in force," and the word "paid" in the N. B. at the foot of the receipt are in Roman letters considerably larger than the rest of the line, although all the words included in the N. B. at the foot of the receipt are in small letters and upon the extreme margin of the paper.

The defendant then offered in evidence the printed book, shewing the instructions to agents & their powers, and proved that these were the instructions given by defendant to Dutcher & Fassett & their powers, and that a copy of this book was sent to all the general agents of defendant.

The following are the material passages in the book:

Defendant's instructions to agents.

52 Page 4: "Agents must not deliver policies until the whole premiums are paid, as the same will stand charged to their accounts until the premiums are received, or the policies returned to the office."

Page 6:

"POWERS OF AGENTS.

"Agents are not authorized to make, alter, or discharge contracts, waive forfeitures, name an extra rate for special risks, or bind the company in any way; their duties being simply to obtain applications for insurance, to collect and transmit premiums, and, generally, to be the medium of communication between the policy-holder and the company."

"Agents are not authorized to write the receipt of premium, or make any endorsement whatever on the policy. The president or secretary are alone authorized to sign receipts for premiums on the part of the company. When a receipt is delivered to a policy-holder by an agent, such agent must countersign the same as an evidence of payment to him."

Thereupon the plaintiff, by her counsel, prayed the court to rule and find as follows:

Plaintiff's prayer.

If the court shall find from the evidence that the application for the

policy of insurance in this case was made by Walter T. H. Miller through the general agents of the defendant at St. Louis; that
53 upon said application the defendant executed said policy and sent the same to its general agents at St. Louis; that said general agents, upon receipt by them of said policy, forwarded and delivered the same by mail to the said Walter T. H. Miller, who, in obedience to the directions of the said general agents, executed and remitted to them the premium notes provided for in said policy, and that said Miller died in October, 1868, whereof the defendant received notice prior to the institution of this suit, and refused to pay the amount of the insurance provided for in said policy, solely upon the ground that the policy was not in force; and further shall find that neither at the time of said application for insurance, nor at the time said policy was sent to or received by said Miller did the said general agents demand immediate payment of the cash premium, but on the contrary, agreed to call upon Solomon Scott for such cash premium when to them it should seem proper so to do; and said agents waived the payment of said cash premium for several months, and treated the said policy as an executed contract, then, if the court so find from the evidence, the plaintiff, by her counsel, prays the court to render its verdict and judgment for the plaintiff, even though it should further find that the said cash premium was never in fact paid.

And the defendant by its counsel prayed the court [court] to rule and find as follows:

54 *Defendant's prayers.*

1. If the court shall believe from the evidence that the application dated June 19th, 1868, was made by the deceased in behalf of the plaintiff, & that the cash portion of the premium was never paid to the defendant, or to any agent of the defendant, and that Dutcher & Fassett, the agents of the defendant, never intended to waive the payment of the cash portion of the premium, & that the deceased did not believe that said cash payment was intended to be waived, then, if the court believe these facts, the defendant prays that a verdict may be rendered in its favor.

2. If the court shall believe the facts stated in the first prayer in reference to the application and the non-payment of the premium, & that the deceased knew that Dutcher & Fassett had no right or authority to deliver the policy without payment of the cash portion of the premium, then there has [has] been no waiver of the payment of the cash portion of the premium, & the defendant is entitled to a verdict.

3. If the court shall believe from the evidence that Dutcher & Fassett's authority was such as is shown by the printed instructions offered in evidence, then the defendant is not bound by their sending of the policy to the deceased, & if the cash portion of the premium
55 was never paid to the defendant, or any agent of the defendant, the judgm't must be for the defendant.

4. The defendant prays the court to rule that the facts testified to by Fassett in reference to the application for insurance by Miller, if true, and the correspondence between Miller and Dutcher & Fassett, & the transmission of the policy & receipt to Miller & the sending of his notes to Dutcher & Fassett, & the receipt of said notes by Dutcher & Fassett, if these facts are believed by the court, shew that there was no waiver by Dutcher & Fassett of the payment of the cash premium.

5. The defendant prays the court to rule that the conversation testified

to by Scott on cross-examination, as having been held with Dutcher, is not competent evidence.

6. The defendant prays the court to rule that the facts testified to by Scott & Fassett in the commission, if true, shew that there was no waiver by defendant's agents of the payment of the cash premium.

But the court rejected the first, second, third, fourth and sixth prayers of defendant, & refused so to rule and find, and granted the fifth prayer of defendant, and further granted the prayer of the plaintiff, &
56 found and decided, as follows:

Judgment.

The court finds all the facts stated in the above prayer, and orders judgment to be entered for the plaintiff for the sum of five thousand and thirteen dollars and twenty-five cents and costs.

WILLIAM F. GILES.

Whereupon the defendant prayed leave to except in respect to said ruling & finding of the court in granting the plaintiff's prayer, & in making its finding & decision, and in respect to its rejection of defendant's first, second, third, fourth, and sixth prayers, & its refusal to rule and find as in them prayed, and further prayed the court to sign and seal this its bill of exceptions, which is accordingly done this 24th day of November, A. D. eighteen hundred and sixty-nine.

WILLIAM F. GILES. [SEAL.]

And now here at this day, to wit, the twenty-seventh day of November, A. D. 1869, the said The Brooklyn Life Insurance Company produced to the said circuit court the writ of the United States of America for the correction of errors of and upon the premises, commanding the record and proceedings aforesaid of the judgment aforesaid, so as aforesaid rendered, with all things concerning the same, to be transmitted to the Supreme Court of the United States, to be held at the city
57 of Washington on the first Monday in December next; which said writ of error is in the words and of the tenor following, to wit:

Writ of error.

58 THE UNITED STATES OF AMERICA:

[SEAL.] The President of the United States to the judges of the circuit court for the fourth circuit in and for the Maryland district, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court before you, or some of you, between Helen A. M. Miller, plaintiff, and The Brooklyn Life Insurance Company, defendant, a manifest error hath happened, to the great damage of the said The Brooklyn Life Insurance Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday in December next, in the said Supreme Court, to be then and there held, that, the

record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of our Supreme Court the first Monday in December, in the year of our Lord one
59 thousand eight hundred and sixty-eight.

Issued the 27th day of November, A. D. 1869.

JAMES W. CHEW,
Clerk Circuit Court.

60 In pursuance whereof, and according to the form and effect of the act of Congress in such case made and provided, a transcript of the record and proceedings of the judgment aforesaid, so as aforesaid rendered, with all things relating to the same, together with the said writ of error, are hereby transmitted to the said Supreme Court accordingly.

Citation.

61 THE UNITED STATES OF AMERICA:

To Helen A. M. Miller, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be held at the city of Washington on the first Monday in December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the fourth circuit, in and for the Maryland district, wherein The Brooklyn Life Insurance Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said The Brooklyn Life Insurance Company in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in this behalf.

Witness my hand and seal this twenty-seventh day of November, in the year of our Lord one thousand eight hundred and sixty-nine.

WILLIAM F. GILES. [SEAL.]

Service admitted November 27th, 1868.

HELEN A. M. MILLER,
By GEO. C. MAUND,
Her Attorney.

62 *Appeal bond.*

Know all men by these presents that we, Cha's C. Bombaugh and Louis B. Pierce, of Baltimore, Md., are held and firmly bound unto Helen A. M. Miller in the full and just sum of ten thousand two hundred dollars, ($10,200 00,) to be paid to the said Helen A. M. Miller, her certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, and assigns, jointly and severally, by these presents, sealed with our seals, and dated this twenty-fifth day of November, anno Domini eighteen hundred and sixty-nine.

Whereas lately, in a suit depending in the circuit court of the United States for the district of Maryland, wherein Helen A. M. Miller was plaintiff and The Brooklyn Life Insurance Company, judgment was

rendered by said court in favor of said plaintiff against said defendant; and the said defendant has obtained a writ of error from the Supreme Court of the United States to reverse the judgment in the aforesaid suit, and a citation, directed to the said plaintiff, citing and admonishing her to be and appear at a Supreme Court of the United States, to be holden at Washington, the first Monday of December, [now:]

Now, the condition of the above obligation is such, that if the said Brooklyn Life Insurance Company shall prosecute the said writ of error with effect, and answer all damages and costs if it fail to make
63 its plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

S. B. PIERCE. [SEAL.]
C. C. BOMBAUGH. [SEAL.]

Signed, sealed, and delivered in presence of—
F. MEDCALFE.

Before me, the subscriber, a justice of the peace of the State of Maryland, in and for the city of Baltimore, personally appeared the above-named L. B. Pierce, & made oath in due form of law that he is worth more than the penalty of the above bond over and above his just debts.
Baltimore, November 25, 1869.

W. H. HAYWARD, *J. P.*

Before me, the subscriber, a justice of the peace of the State of Maryland, in and for the city of Baltimore, personally appeared C. C. Bumbaugh, and made oath in due form of law that he is worth more than the penalty of the within bond over and above his just debts.
Baltimore, Nov'r 25th, 1869.

W. H. HAYWARD, *J. P.*

Bond approved Nov. 25th, 1869.

WILLIAM F. GILES.

64 In testimony that the aforegoing is truly taken and made from the record and proceedings of the circuit court of the United States for the fourth circuit and Maryland district, I have hereunto subscribed my name and affixed the seal of the said circuit court this eighth day of December, anno Domini 1869.

[SEAL.] JAMES W. CHEW,
Clk Circuit Court.

(Indorsement on cover:) No. 411. The Brooklyn Life Insurance Company, plaintiff in error, vs. Helen A. M. Miller. Maryland C. C. U. S.
Filed 30th December, 1869.

Supreme Court of United States.

BROOKLYN LIFE INSURANCE COMPANY,
PLAINTIFF IN ERROR,

vs.

HELEN A. M. MILLER.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

BRIEF FOR PLAINTIFF IN ERROR.

WM. SHEPARD BRYAN,
Counsel for the Plaintiff in Error.

Murphy & Co. Printers and Stationers, 182 Baltimore street, Baltimore.

Supreme Court of the United States.

BROOKLYN LIFE INSURANCE COMPANY,
PLAINTIFF IN ERROR,

vs.

HELEN A. M. MILLER.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

BRIEF FOR PLAINTIFF IN ERROR.

This case was removed to the Circuit Court, from the Superior Court of Baltimore City.

The Plaintiff below (now Defendant in error) brought an action on a Policy of Insurance for the sum of five thousand dollars, $5,000$^{00}_{100}$, on the life of her husband, Walter T. H. Miller. The Policy was proved, and the death of Walter T. H. Miller. It was stated in the Policy that it was made "in consideration of the representations, and agreement contained in the application therefor, and of the sum of two hundred and fifty-four dollars and eighty-five cents to them in hand paid." And it was provided in it, among other things, that in case the assured "should not pay or cause to be paid the premium as aforesaid, on or before the day herein mentioned for the payment thereof * * * * this Policy shall cease, and be null, void and of no effect."

On the left hand margin of the Policy were the following words: "Agents of this Company are not authorized, or permitted, to waive, alter, or change any of the provisions of this Policy."

The deceased applied, in St. Louis, for insurance for his wife's benefit, to Dutcher & Fassett, General Agents of the Defendant in the State of Missouri. He signed a paper in his wife's name thus, "Helen A. M. Miller per Walter T. H. Miller," and delivered it to Dutcher & Fassett. It was headed "Brooklyn Life Insurance Company. Statement required from persons proposing to effect assurance in this Company, and which forms the basis of the contract." (Pp. 16 and 17.) It was stated in this paper that the assured wished to pay partly by note and partly in cash. And at the close of it these words occur: "It is agreed by the undersigned * * * * that the Policy of assurance hereby applied for shall not be binding upon this Company until the amount of premium as stated therein shall have been received by said Company, or some authorized agent thereof, during the lifetime of the party therein assured."

At the time of the application, the deceased having ascertained from Dutcher (one of the agents) what was the amount of the cash portion of the premium, and what the portion to be embraced in notes, said to him: "Send the Policy to me, with the notes, and call on Sol. Scott for the cash part, he has just promised me that he will pay it."

The application was forwarded by the agents to the home office in New York, and in the course of a week, or ten days, the Policy was received by Dutcher & Fassett, from the office in New York. Miller in the meantime had gone to Maryland.

The policy and the premium notes for him to sign were mailed to him. He signed the notes, and returned them, but never at any time paid the cash premium. (Page 14.) The Policy is dated June 21st, 1868, and was received by Miller in July of the same year. He died in Kent county, Maryland, in October following.

In their letter enclosing the Policy, Dutcher & Fassett sent a receipt, at the foot of which were the following words: "N. B. Agents must not deliver policies until premium is received, as no policy is in force until paid for."

The words "must not deliver;" the words "in force," and the word "paid" were in Roman letters considerably larger than the rest of the line. (Page 23) They sent the receipt (as Dutcher testifies,) (page 15,) because they had "confidence that they could get the money at any time they called for it."

The defendant proved the powers of Dutcher & Fassett, as agents; and that they were specially forbidden to deliver policies before the whole premiums were paid; and that they were not "authorized to make, alter or discharge contracts, &c. &c.," "their duties being simply to obtain applications for insurance, to collect and transmit premiums, and generally to be the medium of communication between the policy holder and the Company." (Page 23.)

The President of the Insurance Company, who was called as a witness for the plaintiff, testified (page 11) that the Policy never was considered by the Company in force, and several letters offered in evidence by the plaintiff, (page 10) tended to show the same fact.

The correspondence between the deceased and Dutcher & Fassett was offered in evidence, (pp. 20, 21 and 22) showing the transmission of the Policy, and the unsuccessful attempts of the Agents to obtain the cash premium from the deceased.

The case was tried before the Court without a jury. A conversation between Dutcher and Scott mentioned in Scott's cross-examination, was on defendant's motion, ruled out as incompetent. (Defendant's fifth prayer page 24.)

The defendant contended in substance as follows; (pp. 24 and 25) and so prayed the Court to rule.

First: That if Dutcher & Fassett never intended to waive the payment of the cash portion of the premium, and if deceased did not believe that said payment was intended to be waived, there was in law no waiver of it.

Second: If the deceased knew that Dutcher & Fassett had no authority to deliver the Policy without payment of the cash portion of the premium, there was no waiver.

Third: If Dutcher & Fassett's authority was such as stated above, the defendant was not bound by their delivery of the Policy without payment of the premium.

Fourth: That the facts, if true, as stated in the testimony in reference to the application for insurance, the correspondence between Miller and Dutcher; the sending of the Policy and receipt to Miller; and the receipt of the notes by Dutcher & Fassett shewed that there was no waiver.

Fifth: That all the facts in reference to the subject, in evidence, if true, shewed there was no waiver.

The Court refused to rule as prayed by the defendant, but held that the payment of the cash premium was waived, and gave judgment for the plaintiff.

POINTS.

First: By the original contract between the parties, the Policy was not to be binding on the Company until the premium was paid. This is evident from the concluding portion of the statement making the basis of the contract, (page 17); and also from the terms of the Policy itself. If this condition precedent was not intended to be waived by the Agents of the Company, and if the deceased did not believe it was intended to be waived, the original contract was never changed. The Defendant's first prayer ought therefore to have been granted by the Court.

Second: At the time of the delivery, the deceased, who was acting for the Plaintiff, was informed by the memorandum at the

foot of the receipt sent with the Policy (page 23) that the agents had no right to deliver the Policy before payment of the premium, and that the Policy was not "in force until paid for." The memorandum at the foot of the Policy also informed him, that the agents had no authority to waive any of the provisions of the Policy.

This wrongful delivery, accompanied with the notice to the deceased, was no waiver. The Defendant's second prayer ought therefore to have been granted.

Story on Contracts, 105 section.

Third: The delivery, such as it was, was procured by the deceased upon the faith of his statement that Scott would pay the premium when called upon. The agents were deceived by this representation, and were acting under a false impression, when they forwarded the Policy. A delivery under such circumstances is naught. It would not pass title to goods.

Strong v. Taylor, 2 Hill (N. Y.,) 326.
Henning v. Hoppock, 15 N. Y., 499.
De Wolff v. Babbitt, 4 Mason, 294.
Deshon v. Bigelow, 8 Gray, 159.
Haggerty v. Palmer, 6 Johns, Ch. R., 437.

But even a valid delivery would impose no responsibility upon the Insurer, where there was an understanding that no liability was to attach before the premium was paid.

Mulrey v. Shawmut Insurance Company, 4 Allen (Mass.,) 116.

Tarleton v. Staniforth, 5 Term Rep., 695. Affirmed in 2 Bosanquet & Puller.

Bradley v. Potomac Fire Insurance Co, 32 Maryland, 112.

Such a delivery could not mislead the insured.

All the evidence in the case shews that the Plaintiff was to be considered insured when the premium was paid; and not to be considered insured if it was not paid.

Fourth: Cases may be cited, where it is held that the Insurers waived the payment of the premium, as a condition precedent to the commencement of the risk. But they were decided on the ground that the conduct of the Insurers had induced the Insured to believe that it was not required, and that the Insured would otherwise have been lulled into a false security.

WM. SHEPARD BRYAN,
Counsel for Plaintiff in Error.

Supreme Court of the U. S.

BROOKLYN LIFE INSURANCE COMPANY,

PLAINTIFFS IN ERROR,

vs.

HELEN A. M. MILLER.

Error to the Circuit Court of the United States for the District of Maryland.

BRIEF FOR DEFENDANT IN ERROR.

GEO. C. MAUND,
ARCHIBALD STIRLING, JR.
Counsel for the Defendant in Error.

MURPHY & Co. Printers and Stationers, 152 Baltimore street, Baltimore

Supreme Court of the U. S.

BROOKLYN LIFE INSURANCE COMPANY,

PLAINTIFFS IN ERROR,

vs.

HELEN A. M. MILLER.

Error to the Circuit Court of the United States for the District of Maryland.

BRIEF FOR DEFENDANT IN ERROR.

This case was tried before the Court without the intervention of a jury. It is an action on a policy of insurance for the sum of $5,000, on the life of Walter T. H. Miller, brought by his widow, Helen A. M. Miller, the Defendant in Error, in whose behalf the insurance was made. The Insurance Company was chartered by the State of New York, and was not a mutual, but a Capital Stock Company, (Bouck's testimony, and passages from Defendant's charter, page 11.)

The insurance was effected in the City of St. Louis, through Messrs. Dutcher & Fassett, who were the General Agents of the Company, "for the purpose of transacting all the business of the Company" in the State of Missouri. (Fassett's testimony, p. 15.)

Upon the death of Miller, the Company refused to pay the amount of the insurance solely upon the ground that the policy had never been in force by reason of the non-payment by Miller of the premium. (Bouck's letters, page 10.)

Although the *cash portion* of the premium was never paid, the premium notes were executed and delivered to the Company in compliance with their directions. (Fassett's testimony, page 14, and Miller's letter, page 20.)

The application for the policy was signed by Miller, in St. Louis, on the 19th June, 1868. At this time his residence was in Maryland, but he had been engaged in business for a number of years in St. Louis, with Solomon Scott, (page 12.) On the night after signing the application, he started for his home in Maryland, (page 13.) The Agents of the Company transmitted the policy to Miller, enclosed in a letter, dated July 2nd, 1868, (page 21,) and upon receiving the policy Miller called his wife, and handed it to her, saying: "Helen, here is a present for you."

The Agent (Mr. Dutcher,) with whom Miller dealt in making application for the policy, having died before the testimony was taken, our information as to what occurred between him and Miller at the time is somewhat meagre; but we learn from his associate (Fassett) that it was their custom, in the case of parties whom they well knew, and knew to be good, not to require the immediate payment of the cash premium, but to call for it at any time previous to the report day, which in the case of Miller's policy was August 1st, succeeding the application, (page 15;) that "Miller told Dutcher to call on Mr. Sol. Scott, for the cash part of the premium. He said that Mr. Scott had promised to pay it," (page 14,) and that "from what Miller said the Agents had confidence they could get the money from Mr. Scott at any time they would call for it," (page 15.) Dutcher was entirely satisfied with Miller's representation that Scott had promised to pay the cash part of the premium, and in his letter to Miller, enclosing the policy, said "the cash payments we will get of Scott when the proper time arrives."

Now we learn from the testimony of Scott (page 13) that Miller's representations to Dutcher were strictly true, and that he (Scott) had in fact promised Miller that he would pay "this cash premium."

It is not pretended that in any part of the business the conduct or statements of Miller were deceptive, or in bad faith.

The correspondence between Miller, in Maryland, and the Agents in St. Louis, put in evidence by the Company, (pages 20, 21, 22,) shows that the policy was treated by both sides as a valid and operative instrument, from its execution down to the time of Miller's death, on the 10th of October, 1868; that he was in fact dead when the letter, dated October 14th, notifying him that the policy was forfeited was written; and that so late as August 2d, 1868, one month after the policy had been sent to him, Miller did not even know of Scott's refusal to pay the premium, but believed it had been paid by him according to his promise. (Miller's letter of August 3d, page 20.)

This statement of the case, entirely unembarrassed by any conflict between the testimony of the witnesses, presented to the Court below this prominent question: If the policy, or the application, contained a condition that the policy should not be binding until payment of the whole premium, was not such condition *waived*?

The Court held the affirmative, granted the prayer of the plaintiff, and rejected those of the defendant.

The plaintiff's prayer, granted by the Court is as follows:

PLAINTIFF'S PRAYER.

If the Court shall find from the evidence that the application for the policy of insurance in this case was made by Walter T. H. Miller, through the General Agents of the Defendant, at St. Louis; that upon said application the Defendant executed said policy and sent the same to its General Agents at St. Louis; that said General Agents, upon receipt by them of said policy,

forwarded and delivered the same by mail to the said Walter T. H. Miller, who, in obedience to the directions of the said General Agents executed and remitted to them the premium notes provided for in said policy, and that said Miller died in October, 1868, whereof the Defendant received notice prior to the institution of this suit, and refused to pay the amount of insurance provided for in said policy, solely upon the ground that the policy was not in force; and further shall find that neither at the time of said application for insurance, nor at the time said policy was sent to or received by said Miller, did the said General Agents demand immediate payment of the cash premium, but on the contrary agreed to call upon Solomon Scott for such cash premium when to them it should seem proper so to do; and said Agents waived the payment of said cash premium for several months, and treated the said policy as an executed contract, then, if the Court so find from the evidence, the Plaintiff, by her counsel, prays the Court to render its verdict and judgment for the plaintiff, even though it should further find that the said cash premium was never in fact paid.

Under this prayer of the Plaintiff the Court below, after hearing the testimony and argument, wrote the following judgment:

JUDGMENT.

The Court finds all the facts stated in the above prayer, and orders judgment to be entered for the Plaintiff for the sum of $5,013.25 and costs.

POINTS.

First. If any language in the policy or application, properly interpreted, amounts to a condition that the policy should not take effect until payment of the cash part of the premium, *such condition was waived.*

Boehen vs. Williamsburg In. Co., 35 N. Y. Reports, 131.

In the above case it was held that the delivery of a policy, without requiring payment, raises a presumption that a credit is intended, and that where a credit is intended the policy will be valid though the premium has not been paid.

Goit vs. National Protection In. Co., 25 Barb. S. C. Reports, 189.

Sheldon vs. Atlantic Fire and Marine In. Co., 26 N. Y. Reports, 460.

Wood vs. Poughkeepsie In. Co., 32 N. Y. Reports, 619.

Whitaker vs. Farmers' Union In. Co., 29 Barb. S. C. Reports, 312.

Bragdon vs. Appleton Mutual Fire In. Co., 42 Maine Reports, 262.

Trustees of the First Baptist Church in Brooklyn, et al. vs. The Brooklyn Fire In. Co., 18 Barb. S. C. Reports, 69.

Same case in 19 N. Y. Reports, 305.

Post vs. Ætna In. Co., 43 Barb. S. C. Reports, 351.

New York Central In. Co. vs. National Protection In. Co., 20 Barb., 474.

It must be remembered that Miller had delivered his notes for a large portion of the premium: Was he not liable upon those notes? If so, must not the Company have incurred a corresponding obligation upon the policy?

Bragdon vs. Appleton Mutual Fire In. Co., 42 Maine Reports, 262.

Whitaker vs. Farmers' Union In. Co., 29 Barb. S. C. Reports, 312.

Commercial Mutual Marine In. Co. vs. Union Mutual In-Co., 19 Howard R., 323.

There can no longer be any doubt of the authority of the General Agent to waive a condition requiring payment as a prerequisite to the validity of the policy.

Boehen vs. Williamsburg In. Co., 35 N. Y. Reports, 131.
Goit vs. National Protection In. Co., 25 Barb. S. C. Reports, 189.
Wood vs. Poughkeepsie In. Co., 32 N. Y. Reports, 619.
Sheldon vs. Atlantic Fire and Marine In. Co., 26 N. Y. Reports, 460.
New York Central In Co. vs. National Protection In. Co., 20 Barb. S. C. Reports, 474.

In considering the authority of General Agents to waive the condition in the policy, attention must be given to the distinction, recognized by all the decisions, between capital stock companies, of which this was one, (Bouck's testimony, and passages from Defendant's charter, page 11,) and those established upon the mutual plan.

Brewer vs. Chelsea Mutual Fire In. Co., 14 Gray R., 203.
Baxter vs. Chelsea Mutual Fire In. Co., 1 Allen R., 296.

Second. But in this case there is neither in the policy, nor in the application, any condition that the policy shall not attach until payment of the cash premium.

To show the converse of this, two clauses are relied on by the Plaintiff in error, one in the policy, the other in the application.

That in the policy is as follows, to wit: "In case the said Helen A. M. Miller shall not pay, or cause to be paid, the premium as aforesaid, on or before the day herein mentioned for the payment thereof, or any note or notes which may be given to and received by said Company in part payment of any premium, on the day or days when the same shall become due, or in case the person whose life is insured by this policy shall, &c., &c., then, and in every such case the Company shall not be liable

for the payment of the sum assured, or any part thereof, and this policy shall cease, be null, void and of no effect."

This clause (intended to annul the policy after it shall have gone into effect) clearly refers not to the first cash premium, but to some other premium or note to become due after the policy shall have attached.

This was held by the Court below to be its true interpretation.

The other clause relied on is in the application, and is as follows, to wit:

"It is agreed by the undersigned that the policy of assurance hereby applied for shall not be binding upon this Company until the amount of premium, as stated therein, shall have been received by said Company, or some authorized Agent thereof, during the life-time of the party therein assured."

This clause cannot affect the case in any way, because it refers to the policy, and there is nothing in the policy to which it can be made to apply. Its terms are "until the amount of premium, *as* (*i. e.* in the mode) stated *therein* (*i. e.* in the policy) shall have been received." Referring to the policy for the mode in which the premium is to be paid we find this language only: "By this policy of assurance, in consideration of * * * and of the sum of $254.85 to them in hand paid by Helen A. M. Miller, &c., &c."

Now this language, as far as it designates the mode of payment at all, provides that the payment shall be in cash for the entire premium. But this was not the mode of payment agreed upon between the parties, (as shown by the application and evidence) which was part in cash and part in notes. It therefore follows that inasmuch as the mode of payment stated in the policy is different from that agreed upon between the parties, the clause under examination, which refers to the policy alone, has nothing upon which to operate. Suppose this premium had been paid in the manner agreed upon, to wit: a part in notes, and the balance in cash, might it not still be urged by the Company (*if this clause is to have the effect contended for*) that this policy never went into effect, because the amount of premium, *as stated*

therein, (*i. e.* all in cash) had never been paid? And yet the Company does not contend for this construction, because to do so would be denying the indisputable agreement of the parties.

Third. While the acknowledgment in the policy of the receipt of the consideration money may be contradicted for some purposes, yet it cannot be contradicted for the purpose of annulling the policy, or showing that it never went into effect.

Goit vs. National Protection In. Co., 25 Barb. S. C. R. 189.
New York Central In. Co. vs. National Protection In. Co., 20 Barb. S. C. R., 475.
1 Philips on Insurance, secs. 514, 515.
Barnum vs. Childs, 1 Sandf. S. C. R., 58.
McCrea vs. Purmort, 16 Wend., 471, 472.
Morse vs. Shattuck, 4 N. Hamp. R., 229.
Welt vs. Franklin, 1 Binney, 502.
Belden vs. Seymour, 8 Connec. R., 312.

3 Kent 260. title Estoppel on partial failure of con-

Fourth. The finding of the Court below being a special finding of all the facts stated in the plaintiff's prayer, this Court can not review the evidence upon which said finding was based, but must treat the facts found as conclusively proved. Their sufficiency to support the judgment may be inquired into, but of their sufficiency for that purpose no doubt can be entertained. The Court, in fact, found that the Agents of the Company "waived the payment of the cash premium for several months, and treated the policy as an executed contract." If these facts are to be treated by this Court as conclusively established by legal evidence, how can the right of the plaintiff to recover be denied?

13 United States Statutes at Large, 501.

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